“Twenty years is nothing” in television regulation

José Carlos Laguna de Paz

As technology develops, so must the definition and regulation of television be updated. Broadcasting cannot be considered a “public service” to be granted by the state to just a few operators via discretionary ‘beauty contests’. Rather the freedom of broadcasting should be the cornerstone of the sector. Commercial operators should not be subject to the obligation of fostering (“quotas”) or financing European programmes. Public broadcasters are not justified under any circumstance. The state’s role is not to offer a mix of entertainment and information. Its duty is much more to foster as much competition as possible, to fight against undue media concentration and to safeguard the rights and values involved in broadcasting.

Keywords

Public service, freedom of television, competition, convergence, deregulation, liberalisation.

A new environment of technology, business and service convergence

Over the last twenty years, television has undergone an extraordinary change. We have gone from a medium with one or two operators to the current situation, characterised by wealth of channels: (i) broadcast via different means of transmission (Hertz bandwidths, satellite, cable); (ii) at different levels in terms of territory (international, national, regional (autonomous community) and local) (iii) and both freely available and subscriber only. The switchover to digital (2010) will also allow better use to be made of the electromagnetic spectrum.

We should also take into account the possibilities offered by technological convergence and the new telecom infrastructures. The digitalisation of content means that networks are no longer tied to providing specific services and take on a multipurpose function. Television and video services are already being sold on demand via the telephone line (DSL) and even the electricity network (PLC). A common strategy is currently being prepared at a European level to facilitate the development of television via mobiles, based on open standards (DVB-h). New generation networks (NGN) permit an unprecedented development of audiovisual services. Within this context, everything seems to suggest that television via the Internet will end up playing an important role (IPTV). For example, the BBC itself is preparing to launch a new version of its website that will provide access to all its programmes broadcast the previous week (*iPlayer service*).

José Carlos Laguna de Paz
Full-time lecturer in administrative law at University of Valladolid

Work pending: from public service to television freedom

As in the words of the singer Gardel, twenty years is nothing – in life as it is in television legislation. The medium has undergone extraordinary development that even brings into question how we define the activity *[linear and non-linear (on-demand) services]*, as well as the foundations of its traditional legal regime. In contrast, regulations continue to respond to the model of television of the sixties, characterised by very few broadcasters.

Since its very beginnings to our present day, television has invariably been configured as a public service. The plasticity of this concept can lead to confusion. However, regarding television, public service unmistakably means public ownership of the activity, with it being reserved for public powers (section 2 of article 128 of the Spanish Constitution) (see Laguna). So-called private television consists, therefore, of the indirect management of a public service, after a licence has been granted by the public administration. In practice, it is also public television (see Muñoz Machado). As an exception, there are two types of television that have been liberalised: satellite television (Act 37/1995) and cable television (general telecommunications act 32/2003).

Classifying television as a public service has always been controversial. One sector of the doctrine defended its position using the Spanish Constitution (see De la Quadra; Chinchilla), while another considered it incompatible with the freedoms that underline the activity (see González Navarro; Ariño). For its part, the Spanish Constitutional Court (TC) admitted the constitutionality of the issue, although with increasingly more nuanced jurisprudence

In any case, at present public service does not seem to be justified. Technological development is making it increasingly more difficult to maintain an "excessive and unnecessary" legal regime (see Fernández Farreres) that could be an instrument of political power (see Meilán) and that restricts the freedom of television. With regard to this issue, the following arguments must be taken into account:

1. In public service, of note are the powers held by the public administration to direct the activity. To a certain extent, freedom is secondary within the institutional logic of public service, the reason for which is especially to guarantee, via public means, the provision of an activity essential to citizens as a whole (see Martínez López-Muñiz).

2. In public service, private initiative is replaced by the prudence of the governing body, which tends to plan the sector and restrict free competition based on aprioristic calculations of the number of firms the market can take (see Laguna).

3. Nowadays, it seems hard to deny the possibility of achieving real pluralism in TV supply as a whole. Moreover, the existence of technical limitations with regard to some types of transmission does not require television to be public but merely organised, so that an adequate selection is guaranteed for beneficiaries and, if necessary, the imposition of obligations of general interest.

We must recognise that television is a private activity, of general interest (see Laguna). Those regulations that consider television to be a public service whose management is "granted" to a few people must be supplanted. We must therefore affirm the freedom of television that, in all its modes, must be open to all initiatives that are technically possible.[1]

Naturally, this does not mean that television mustn't be subject to appropriate regulations in order to guarantee the general interest. We are also faced with the delicate question of whether private firms must be subject to the same rules as public bodies. With regard to this question, we must remember that public bodies are only justified as long as they fulfil the purpose for which they were set up (section 1 of article 103, Spanish Constitution), something that leads them to aim their programming towards these objectives. On the other hand, private companies simply exercise free enterprise (article 38, Spanish Constitution) in carrying out an economic activity with components of information, culture and especially entertainment. It does not seem, therefore, that regulations should be equally harsh in compelling these

1 "Also this does not imply that traditional broadcasting regulations need to be applied to IPTV services; rather it could imply that broadcasting regulations may be deregulated due to the increased competition in the relevant market(s)". OECD, IPTV: Market developments and regulatory treatment, 19.12.2007, DSTI/ICCP/CISP(2006)5/Final, p. 6.

two parties in aspects such as pluralism or the provision of programmes with components of general interest.

This is not an obstacle to there being a series of principles, related to the freedom of expression and information (article 20, Spanish Constitution) that constitute general limits to exercising the activity and that, as such, bind broadcasters, both public and private. This does not mean that each medium cannot have its own "tendency", something that is inevitable. The aim is to ensure that the media offer a balanced view of reality that complies with the duties of journalistic diligence, and that they don't become mere vehicles of propaganda, with biased information or information that attacks the values on which civil wellbeing is founded.

In addition to the outmoded legislative situation for television there is also the chaotic situation of the regulations. For example, Act 4/1980, of 12 January, of the Statute for radio and television (ERTV), was repealed by Act 17/2006, of 5 June, on state-owned radio and television, but its applicability is declared for the purposes provided for in Act 46/1983, of 26 December, on the third television channel (LTerC) and in Act 10/1988, of 3 May, on private television (LTPri) [section 1 of the sole repealing provision]. At present, the regulations for the sector are some of the most com-plicated, diffuse and unstable. Their reform is therefore a requirement that cannot be postponed. We need to put an end to the current legislative puzzle, which makes life unacceptably difficult for providers of audiovisual services and weakens their legal certainty.

The state also encourages self-regulation in the industry (see Esteve Pardo). This is a very interesting mechanism, through which operators undertake to exercise their freedoms appropriately, especially in aspects where the limits are difficult to determine, such as requirements for quality in programming or protecting children or young people. However, self-regulation can exercise a complementary role but it cannot replace public regulation.

The state is responsible for defining the model of television, notwithstanding its development and application by the autonomous communities

The state is exclusively responsible for telecommunications (art. 149.1.21a, Spanish Constitution), while the social media are only subject to basic legislation (art. 149.1.27a, Spanish Constitution). These are therefore different levels of authority, although they may need to be interpreted together: "they are necessarily limited and offset each other, and prevent the mutual emptying of respective content."[2] From this perspective, the granting of licences for broadcasting is linked to social media area of competence, while the technical aspects of transmission, including the approval of the corresponding technical plan, are related to telecommunications area of competence.[3] The executive powers of inspection, control and discipline come under the substantive area of competence.[4]

Within this context, convergence only fuddles the boundaries of business activity, not that of competence-related licences, the limits of which continue to separate transmission (telecommunications) from content (social media). In fact, the European regulation of 2002 aims to regulate the new electronic communications sector with the exclusion of content. The same occurs with Spanish regulations [section 2 of article 1 of Act 32/2003, of 3 November, on general telecommunications (LGTel)].

Since the beginning, the state has interpreted its authority extensively. However, the switchover to digital television has broadened the powers of the autonomous communities. Specifically, the basis of the system is made up of the following:

1. Television is classified as a state-owned public service (section 2 of article 1, ERTV). The logic of public service is also extended to transmission via digital technology, both at a state and at a regional level, although the plan is to grant as many licences as there are technical availabilities (sec-

2 Ruling of Spanish Constitutional Court (STC) 168/1993, 28 May, FJ 4; STC 244/1993, 15 July, FJ 2; STC 127/1994, 5 May, FJ 8.

3 STC 278/1993, 23 September, FJ 2; STC 168/1993, 28 May, FJ 4 (radio broadcasting).

4 STC 278/1993, 23 September, FJ 2 and 3.

tion 4 of additional provision forty-four of Act 66/1997). The only types of liberalised television are those broadcast by means of satellite or cable.

2. The Autonomous Communities (CAs in Spanish) have recognised powers to implement and execute regulations with regard to the different types of television, within the context of the autonomous community and at a local level:

- **Analogue television**: the CA can manage the "third state-owned television channel" (art. 1, LTerC), via authorisation from the government (additional provision six, LTerC). Pursuant to section 3 of article 20, Spanish Constitution, the CA must previously regulate the organisation and control via parliament of the third channel (art. 7, LTerC). Apart from the Basque CA, which started to broadcast television without state authorisation, most of the CAs have obtained the corresponding licence from the administration.
- The **third channel** is managed by the corresponding public limited company set up for this purpose (article 6, paragraph 2, LTerC), whose capital must be completely subscribed by the CA (art. 9, LTerC). This stops any indirect management of the service. Notwithstanding this, and within these limits, the CAs can independently manage the television channel without the state interfering in programming. Initially, the infrastructure for distributing the signal was owned by the state (art. 2 and 4, LTerC). However, later liberalisation meant that CAs could install their own infrastructures.

In spite of this, analogue broadcasts, of state or CA coverage, will have to end by 3 April 2010.

- **Cable television**: the CA is responsible for granting authorisation to provide broadcasting services that do not go beyond its boundaries, which must be entered in the autonomous registers set up for this purpose [Additional provision ten, LGTel (wording of Act 10/2005)].
- **Digital terrestrial television**: each CA has one digital multiple covering its region. The public bodies created pursuant to LTerC must alternate broadcasts via analogue and digital technology.

Once analogue broadcasts have ended, each CA will have two digital multiples covering its region. The CA will decide which channels will be managed directly (previously assigned by the government) as well as those run by private firms. The CAs will grant licences to manage the service indirectly, either at a regional or local level, subject to the technical plans and regulations for providing the service approved by the state (section 4 of additional provision forty-four of Act 66/1997).

- **Over-the-air local television**: the CAs have recognised powers to develop and execute state legislation [art. 2, *in fine*, of Act 41/1995, of 22 December, on over-the-air local television broadcast (LTLoc)].
- **Satellite television**: the CAs can also provide these services.

3. The electromagnetic spectrum is classified as a state-level public domain (section 1 of article 43, LGTel), so that operators must also obtain the corresponding licence.

As we have been explaining, state legislation can be criticised in some points. However, while it is in force, it links all public powers. Hence the Catalan Act 22/2005, of 29 December, should be considered unconstitutional, because it exceeds its authority and contradicts some essential aspects of state regulation: the definition of the activity's regime (art. 3); the electromagnetic spectrum (title II); the definition of audiovisual public service (title III); administrative operating permits (in spite of the contradictory Transitional provision six: licences "shall adopt the form of an administrative concession), guarantee of pluralism and control of concentration (title IV); regulation of content (title V), etc."

Local television: from anarchy to legality

For years, the state legislator failed to regulate the medium, which did not stop it from developing outside the boundaries of law. Act 41/1995, of 22 December, on over-the-air local television (LTLoc), regulated the sector in general. In spite of this, it will probably be regulated definitively when digital television is implemented.

The national technical plan for local digital television [R. SR. 439/2004] determines the multiple channels available, as well as their coverage (section 1 of article 3, LTLoc). On the request of local bodies, the CAs subsequently fix the programmes in each demarcation, at least 1 and exceptionally 2, reserved for direct management of the service (section 1 of article 9, LTLoc). The remaining programmes will be adjudicated by the CAs for indirect management of

the service (section 2 of article 9, LTLoc). Local terrestrial television stations will not be able to broadcast or form part of a television channel (art. 7, LTLoc).

Notwithstanding this, the switchover to digital has been postponed given the difficulties in effectively implementing digital television. So those authorised stations that have carried out broadcasts under transitional provision one of the LTLoc will be able to continue with their analogue broadcasts for two years, as from 1 January 2006, provided their territory does not exceed that of the digital licence granted and that such broadcasting is possible in terms of wavelength availability and planning (section 5 of transitional provision two, paragraph 1, LTLoc). The government may modify this deadline, taking into account the state of development and penetration of digital technology (section 6 of transitional provision two, LTLoc).

Public television requires sufficient justification

For decades, public television channels enjoyed a monopoly, something that has helped consolidate their position extensively. However, the appearance of private television has brought the legitimacy of this situation into doubt. In fact, in recent years programming, organisation and funding has been debated non-stop. The crisis has even reached the legendary BBC on the occasion of renewing its charter. We mustn't forget that the Peacock report (1986), now relevant again, stated that the content of public service not covered by the market did not necessarily have to be provided by the BBC: the private providers of audiovisual services could also receive public funds to provide content of general interest.[5]

The starting point is that public television is not a necessary component of the system. Section 3 of article 20 of the Spanish Constitution does not require public social media to be maintained.[6] The only requirement is to guarantee that the organisation, management and control of the media that, at any time, depend on public bodies follow specific criteria (against that, see De La Quadra).

For its part, European community law, although recognising the importance of the public broadcasting system, leaves the member States a lot of room to manoeuvre in structuring a television system that meets the requirements of general interest (Amsterdam Treaty).

In principle, the public powers must focus on specific functions, which are not to provide citizens with information and entertainment. Public television, like any other public intervention, requires justification. Unlike private television, which is the direct expression of the free initiative of citizens, public television is only legitimate as long as it pursues general interest, with the necessary, reasonable and proportionate means (see Laguna).

Consequently, the state, CAs and local bodies must precisely define the functions entrusted to public television. The promotion of regional language and culture justifies the creation of regional public television only if (in the context in question) it is considered to be a necessary measure, appropriate and proportionate.

The sector is constantly changing, so that no-one can say whether public television will have a role to play in the medium-term. As in any other sector, the development of private television can satisfy all the demands for general interest related to this activity. Notwithstanding this, although it may be considered appropriate, public television can exercise a complementary function, attending to aspects not covered by commercial channels. This does not mean that it cannot be set up as generalist television, with the aim of reaching a significant spectrum of the population (section 2 of article 2 of Act 17/2006). However, its programmes must stand out in terms of paying priority attention to information, education and culture. It must promote the production of programmes that reflect the historical and current reality of our country, intellectual, social and political debate or attention to the Spanish-speaking market. Broadcasts must not include products that offend the average viewer.

5 Along these lines, the Institute of Economic Affairs published a report entitled *Public Service Broadcasting without the BBC?* (2004).

6 STC 86/1982, 23 December, FJ 4, with Díez de Velasco voting against.

Programming: protecting the general interest and encouraging European works

Television organisations have the freedom of programming that, in the case of private firms, results from the freedom of expression and information [points 1a and 1d of article 20, Spanish Constitution], as well as free enterprise (article 38, Spanish Constitution). However, this freedom must be exercised while respecting the other rights, principles and values recognised by law (article 4, ERTV).

Firstly, television operators are subject to a series of duties of a constitutional level, consubstantial to the activity being carried out (article 4, ERTV): objectivity, accuracy and impartiality of information; their separation from opinion; respect for pluralism and constitutional rights.

Secondly, in a medium that penetrates homes with impunity, the protection of children and young people takes on particular importance (articles 17 and 20 of Act 25/1994, of 12 July, on television without frontiers = LTsFr). However, these regulations are difficult to apply. That is why the government has promoted self-regulation in this area (additional provision three, LTsFr). On the other hand, the development of digital television could be accompanied by greater choice for viewers. In *à la carte* television, protecting children and young people cannot be based so much on general rules but on the need to support (or impose) the development of technology to filter or block content.

Television regulations curtail the free management of the business by imposing controversial screen quotas, whose aim is to promote national and EU audiovisual works (section 1 of article 5, LTsFr). These obligations are not imposed on broadcasts with local coverage that do not form part of a national network, although the CAs can introduce equivalent rules regarding local television to encourage audiovisual works in their own language (section 5 of article 2, LTsFr).

These limits have always been the object of discussion: (i) the screen quotas and particularly the obligation to fund European films are a restriction to free enterprise and to the right to property, and of doubtful constitutional validity; (ii) the existence of public television companies should release private operators from requirements concerning general interest such as these; (iii) the effectiveness of these measures is highly doubtful, as technological development guarantees the viewer's freedom, who cannot be forced to watch European works.

Defending competition

Television regulations include specific rules that attempt to protect free competition and, with this, the pluralism of information, essential in a democratic society. In those aspects not regulated by the industry's legislation, the general rules are applied that defend competition, which thereby develop a complementary function of growing importance.

Initially, Act 10/1988 (LTPri) established restrictions aimed at guaranteeing internal pluralism, limiting to 25% the holding that one person could have in a company authorised to broadcast. However, this limitation has disappeared, as it not only made it difficult to run the firm but also became meaningless as technological development increased the medium's broadcasting capacities.

In order to protect (external) pluralism, the Act limits the holding of shares, as well as voting rights in more than one authorised broadcaster, in particular when operating in the same geographical area (article 19 LTPri). However, unlike what happens in other countries, the regulations do not establish any restriction to multimedia concentration, something that seems to be a serious failing, as the joint ownership of television and radio channels and the press could seriously affect the pluralism of information.

Exclusive rights are particularly relevant in television. This is a licit commercial practice provided it does not violate the right to access information on the part of the public nor free competition. That is why exclusive rights are subject to some limits:

1. Those exclusive rights are prohibited that, either due to their duration, scope or context, have the effect of blocking the market, limiting access to third parties during too long a period of time or that might falsify competition.

2. Events of great social relevance (including sports broadcasts) must be broadcast openly [section 3 of article 4 of Act 21/1997, of 3 July, regulating live and recorded broadcasts of sports competitions and events (LEDep)].

3. The right is recognised to broadcast a news summary regarding events of public relevance subject to exclusive

rights (article 2, LEDep).

4. The acquisition of exclusive rights by regional television channels must not impede dissemination on a national scale (article 16, LTerC).

The development of subscriber digital television depends on a series of associated services (conditional access, interfaces to apply digital electronic programmes and guides). It's important for the business control of these services not to introduce barriers to entering the market, nor to distort competition, so that they must be offered and applied under reasonable and non-discriminatory conditions.

The Protocol annexed to the Amsterdam Treaty allows states to choose the financing system for public service broadcasting they considered to be most suitable, including the combination of public subsidies and commercial income. This is the model followed by public television in Spain.

However, this financing system is only justified as long as public television implements programming of general interest. If not, state funding (irrespective of the format adopted, be it a duties, subsidies, waiving of debt, state-backed guarantees), would constitute public aid (article 87, Amsterdam Treaty), which might distort the conditions of competition.

States therefore have to accurately define the tasks of general interest entrusted to public television bodies (section 2 of article 86, Spanish Constitutional Court). One key aspect with regard to this issue is that the European Commission allows public television channels to develop generalist programming, aimed at achieving broad audience levels, provided these are of good quality. However, from this perspective, it does not seem at all easy (as also required by the Commission) to distinguish between the two types of business, commercial and public service, that may be carried out by public television channels, apart from the separation of accounts and analytical accounting. In reality, all programmes must meet requirements of quality that justify the existence of public television so that, inevitably, the financing system must refer to programming as a whole. Moreover, the classification of public service can also depend on other factors, such as universal coverage or the open nature of broadcasts.

On the other hand, the Commission recognises that its function isn't to control the opportunity, content or quality of programmes. Its role is limited to penalising "manifest errors" in defining tasks of general interest, when the democratic, social or cultural needs of a society cannot be deemed to be met.

Discussion of the expediency of independent administrative authorities

One of the recurring themes in television is how expedient it is to entrust public powers and sector supervision to independent administrations. Attempts are made to achieve their political 'asepsis' via the "protected" status of the members, which are also chosen by broad parliamentary majorities, by the combined action of the main public powers or by the most representative social forces.

The aim of the model of the Board of Directors of the RTVE Corporation is to respond to this proposal (art. 10 and sub., Act 17/2006), assisted by an Advisory Council, as a body made up of representatives from society (art. 23) and Informative Councils, with the participation of information professionals (art. 24). With one or more variants, the organisation of some CAs also follows this same philosophy.

In terms of organisation, technical solutions must be judged by their results. In spite of this, a number of general observations can be made:

1. The natural framework for this kind of organisation is the open administrative model from the Anglo-Saxon world, not in our system where administrative bodies are constitutionally bound to objectively serve the general interest (art. 103, Spanish Constitution), with impartiality and independence.

2. In practice, it is by no means easy to delimit functions that are completely "neutral", that do not have some degree of *indirizzo* or other. Regarding the government of public issues, there is no full or scientific technical 'asepsis', nor a complete axiological order shared by all throughout their extension or hierarchy. Beyond some general principles concerning the role that must be played by (public) television, which the majority agree on, differences of opinion immediately appear concerning the opportunity of specific programming, whose evaluation depends not only on their own understanding of the situation but also on specific interests, from which it is very difficult to distance oneself. Moreover, these organisations, once set up, quite often feel

called upon to develop their own policy. This is how they progress towards constitutional legitimacy as, beyond the exceptions expressly provided for in the Constitution, the government is responsible for directing their executive function (art. 97, Spanish Constitution), being responsible for its exercise, always blurred whenever these organisations intervene.

3. Experience shows that independent administrations are yet another organisational instrument, not the panacea for all ills. The technical and legal guarantees provided by legislation to ensure their independence, although admittedly to varying degrees, have a relative virtuality. Ultimately, the key to effective functioning lies in something as difficult to build up and as fragile as institutional prestige. In the long-term, only this can keep them safe from any interference from politicians or particular interests.

4. The arguments in favour of these administrations would lose force if the activity were suitably organised. Affirming the freedom of television, per se, would reduce the risks of the state being involved in this sector. On the other hand, if the legislator defined a precise model of public television, some points of conflict with private operators would be eliminated and, consequently, the need to look for a neutral arbitrator outside the government administration.

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